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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 728

NORTH PIER TERMINAL CO.,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, North Pier Terminal Co., respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and in support of its petition shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a test suit, brought by the respondent Interstate Commerce Commission, and seeking a decision by the courts as to the legality under the Interstate Commerce Act of

payments made by numerous motor carriers to petitioner. The case involves written contracts between petitioner and the various common carriers and the Commission asserts that the payments are unlawful rebates because made pursuant to contract without special tariff provision. The contracts were undertaken by the carriers and petitioner under the following circumstances:

Petitioner operates a terminal building in which it rents space to some 75 tenants; the tenants ship freight interstate over the lines of more than 100 different motor common carriers, who are subject to the Interstate Commerce Act. (R. 60-1) The carriers' tariffs provide rates for such transportation and the shippers pay the full rates and charges so provided. (R. 65)

The tariffs of the motor carriers specify that the rates include, without additional charge, the service of receipt and pick-up of the freight at points accessible to carriers' vehicles at any and all business establishments in Chicago, including petitioner's building. (R. 65) There are at petitioner's building more than 90 different doors and platforms that answer the tariff test of accessibility and these are located both in front and at the rear of the building, which is a third of a mile in length. (R. 60-1)

In an effort to save on the high cost of multitudinous pick-ups at 90 individual shippers premises, and to alleviate serious congestion of carriers' vehicles, the carriers engaged petitioner to provide at its building two freight stations and these stations were to answer the test of accessibility to carriers' trucks. (R. 62, 80) By identical contracts each of the carriers employed petitioner as its agent to receive and receipt for freight in the name of the carrier at such stations. The stations were available to all shippers, who had the option of tendering freight to petitioner as

agent at the stations or to carriers' drivers at individual loading platforms. (R. 64-5)

Under this arrangement, carriers' vehicles loaded from the stations at carriers' convenience and petitioner assisted by safeguarding, handling and accounting for the property until loaded. (R. 63-4) Petitioner received compensation of 4 cents for each 100 pounds of freight received and handled through the stations. No part of the payments to petitioner was turned over to any shipper. Petitioner handled no freight of which it was either shipper or owner. (R. 65)

The tariffs of the carriers contained no reference to the contracts, nor to the functions or compensation of petitioner. (R. 65)

The foregoing arrangement was in effect under oral agreement for more than six years. (R. 61) During this time the parties made full disclosure and reports of their practices and arrangements to the Commission. (R. 26-33)

On March 7, 1946, the carriers and petitioner were addressed in a letter by the Commission's District Director at Chicago. The letter cited a recent decision of the United States Circuit Court of Appeals for the Sixth Circuit (*C. & D. Motor Delivery Co.* v. *U. S.*, 150 F. 2d 250) and the District Director concluded that the above described arrangement of petitioner was unlawful. The Director warned the parties not to continue their practice. (R. 34-5) The cited case involved a public warehouseman who acted as representative of the shipper in consigning shipments. The services for which he was paid by the carriers included picking up shipments at various points in the warehouse and assembling them at one point for loading. Petitioner does not perform shipping services for its tenants and does not collect shipments. (R. 53, 65) Subsequently, the agreements between petitioner and carriers were reduced to writing and continued in effect. (R. 61)

The Commission did not exercise its own jurisdiction to undertake formal investigation and enter an order based upon findings. Instead it applied to the courts for a determination of the controversy, bringing this suit for an injunction, as authorized in Section 222 (b) of the Interstate Commerce Act (49 U.S. Code, Sec. 322(b)). The Commission charged therein that the arrangement was undertaken for and on behalf of petitioner's tenants, the shippers, without requisite tariff authority, disregarding that the tariffs provide generally for store door pick-up throughout the city. It alleged that the practices of petitioner and the motor carriers were in violation of Sections 217(b), 222(c) and 225 of the Interstate Commerce Act. (49 U.S. Code, Sections 317(b), 322(c) and 324(a)). (R. 2)

Section 217(b) provides that no common carrier shall charge a different rate than that provided in its tariffs, nor refund by any device any portion of the rates so specified, nor extend any privileges or facilities for transportion except such as are specified in the tariffs. Section 222(c) makes it a misdemeanor to rebate or refund any portion of the tariff rates. Section 225 requires that when the owner of the property transported renders any service connected with transportation, the allowance therefor must be just and reasonable and shall be set forth in published tariffs. These sections of the statutes are printed in full in the Appendix to the brief attached in support of this petition.

The parties made counter motions for summary judgment and filed a stipulation of agreed facts upon which the District Court decided that the payments to petitioner were, in effect, payments to the shipper and rebates within the condemnation of the law. (R. 66-7) The decree enjoined petitioner and the motor carriers from continuing the payments to petitioner without tariff provision therefor. (R. 68-70)

On appeal, the court below found that no shipper obtained special benefit through the arrangement. However, the court held that the payments are prohibited rebates even though they were not made to a shipper and no shipper benefited therefrom, directly or indirectly. It affirmed the decree, with one of the three judges dissenting. (R. 79-87)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 204(a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U.S. Code, Sec. 347). The judgment of the lower court was entered January 17, 1948. (R. 89) This petition was filed on April 9, 1948.

QUESTIONS PRESENTED.

This case presents three important questions of Federal law which have not been, but should be, settled by this Court.

1. Do payments made by carriers in compensation for services rendered by an agent, which payments do not reach or benefit any shipper, constitute a "refund" of a portion of the rate paid by shippers within the meaning of the prohibition contained in Section 217(b) of the Interstate Commerce Act?

This question arises because the court below rejected the charge that the payments were for the benefit of the shippers but held that they were nevertheless unlawful refunds because the carriers retain (for their own use) less than the rate paid by the shipper and less than they would retain if they operated the station facilities with their own employees.

2. Does Section 217(a) of the Interstate Commerce Act prohibit carriers from using an agent to provide station facilities unless and until the arrangement therefor is shown in the carriers' tariffs?

This question arises because the court viewed the arrangement as resulting in a different service from that provided in the tariffs and held that Congress intended in Section 217(a) to compel carriers to collect identical charges for identical service.

3. Does Section 222(b) of the Interstate Commerce Act require carriers to show in their tariffs the payments which they make to agents who are not shippers?

This question arises because the District Court found that respondent stood in the shoes of the shipper and payments to it must be published in tariffs. Petitioner assigned error to that conclusion in the court below, which failed to decide this question. The opinion of the dissenting judge states that the majority ignored this vital question and that it should have reversed the trial court.

4. Do the stipulated facts support the conclusions of the District Court, which were in effect affirmed by the court below, that petitioner stands in the shoes of the shippers or that the employment of petitioner to furnish and operate receiving stations constitutes an extra service to the shipper in excess of the carriers' tariff obligation.

This question arises because the Commission asserted and the District Court concluded that petitioner's services were rendered on behalf of the tenants of petitioner. The court below rejected this charge but failed to make clear its own conclusions.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner urges that this court should review the decision of the court below for the following reasons:

1. The case presents important questions of Federal law which should be settled by this court. These questions arise in connection with a course of conduct which many common carriers have followed over a long period. The Commission applied to the courts for a judicial determination of the disputed questions raised by its staff. The parties and the public need a decision by this Court to settle authoritatively the matters in controversy.

2. The court below has decided the questions presented in a way that conflicts with applicable decisions of this court. In holding that the statute prohibits payments which are not made to, or for the benefit of the shipper, the lower court misinterpreted the decision of this Court in *Union Pacific R. Co.* v. *United States,* 313 U.S. 450.

3. The court below failed to review the conclusions which the trial court reached from the stipulated facts. It expressed views contrary to the conclusions of the District Court, yet failed to enter appropriate findings or conclusions and left the parties in confusion as to the legal significance which it attached to the facts.

Wherefore, petitioner respectfully submits that this case calls for the exercise by this court of its supervisory power by granting a Writ of Certiorari and thereafter reversing the decision of the United States Circuit Court of Appeals.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The District Court wrote no opinion. Its findings and conclusions are reproduced in full in the printed record. (R. 60).

The opinion in the Circuit Court of Appeals is reported in 164 F. 2d 640 and in the printed record. (R. 79)

JURISDICTION.

This court has jurisdiction to require by certiorari the certification to it for determination of any case in the Circuit Court of Appeals. (28 U.S. Code, Sec. 347) This petition was filed on April 9, 1948, within three months after the judgment of the court below was entered, January 17, 1948. (R. 89) (28 U.S. Code, Sec. 350)

This case involves important questions of Federal law which have not been, but should be, settled by this court.

(Supreme Court Rule 38, Par. 5(b)) This court has not considered the proposition here asserted, that the Interstate Commerce Act prohibits as rebates payments that are made to one who is not a shipper and which do not reach or benefit any shipper, directly or indirectly.

The decision of the court below is in conflict with applicable decisions of this court. (Supreme Court Rule 38, Par. 5(b)). This court decided in *Union Pacific R. Co.* v. *United States,* 313 U.S. 450 that concessions made to shippers in respect of transportation were rebates although such concessions were made by one not a carrier, where the concessions were in the interest of a carrier who extended financial aid and played a dominating part in securing such concessions for the shipper. The court below has misinterpreted this decision as holding that a prohibited rebate need not be to the shipper.

The court below has departed from the accepted and usual course of judicial proceedings by failing to require the entry of findings and conclusions consistent with its stated opinion and in failing and refusing to decide questions raised by petitioner's specification of errors. (Supreme Court Rule 38, Par. 5(b))

Jurisdiction in this case is sustained by the decision in *General American Tank Car Corporation* v. *El Dorado Terminal Company,* 308 U.S. 422, 424.

STATEMENT OF THE CASE.

The facts of the case have already been sufficiently stated in the preceding petition, page 1. The case was submitted on a stipulation of facts, which is set forth in full in the printed record. (R. 51)

ERRORS RELIED UPON.

1. The United States Circuit Court of Appeals erred in failing to set aside each of the conclusions which the trial court drew from the stipulated facts and to which petitioner assigned error in the court below. (R. 73) The court further erred in failing to require the entry of findings and conclusions consistent with its expressed opinion.

2. The court erred in holding that remittances by a carrier to its agent are prohibited rebates even though such remittances are not made to a shipper and do not benefit a shipper directly or indirectly.

3. The court erred in holding that the statute requires tariff publication of arrangements whereby carriers employ an agent to provide station facilities.

4. The court erred in holding in effect that payments to one who is not a shipper must be published in the carriers' tariffs.

ARGUMENT.

Petitioner seeks a review of the case by this Court because the case involves novel and important questions as to the meaning and intent of the Interstate Commerce Act. Those questions should be settled by this Court in order that petitioner, motor common carriers, and the public may lawfully conduct their affairs with certainty. The decision of the court below conflicts with previous decisions of this Court and applies to the facts an unprecedented concept of the statute. In addition, the opinion of the court fails to spell out the legal significance of the facts or to state clearly the conclusions to be arrived at from those facts.

The relation between shipper and carrier as the test of rebates.

The stated basis for the complaint of the Commission was its assertion that the practices of petitioner and the motor carriers were for and in behalf of tenants of petitioner (i.e., the shippers). (R. 4) The Commission argued and the District Court adopted conclusions of law to the effect that the tariff rates of the motor carriers do not include the work done by petitioner, that the stations established under the contract were facilities maintained for the convenience of the shippers and were not freight stations of the carriers, and that it is not the function of the carriers to do the work for which they paid petitioner. (R. 66-7)

Petitioner assigned error to each of these conclusions of the District Court. (R. 72-3) In its opinion, the Circuit Court of Appeals did not sustain the conclusions. On the

contrary, the court observed that the assailed arrangement was undertaken because of congestion of carriers' trucks. (R. 80) The court noted that the service given the shippers under the assailed arrangement is not greater than the store-door pick-up provided in the tariffs. (R. 82) Finally, the court said that it was unable to appreciate how a shipper actually benefits from the arrangement. The court said (R. 82):

> Were we approaching this problem as an original proposition, without prior reading of the statute and decisions, we would have strong inclination to approve of any voluntary arrangement whereby parties simplified and expedited shipments in an efficient manner, without seeming detriment to others, for we are unable to appreciate how a shipper actually benefits by the Terminal Company's services, except for the availability of carts for carrying the merchandise to the "stations" of the Terminal Company, and these carts seem to be available to all tenants.

In this expression the court effectively discarded the proposition upon which the complaint of the Commission was based, namely that the services rendered and payments made were for the substantial benefit of the tenant shippers rather than in aid of the motor carriers in performing their transportation functions.

Nevertheless, the court affirmed the decision of the District Court, stating that in its judgment the statutes made such affirmance mandatory. (R. 83)

The court arrived at this conclusion from a reading of the language of Sec. 217(b) which, in the words of the court, "provides that the carrier shall not receive a 'less or different compensation for transportation * * * between the points enumerated in the tariff than the rates * * * specified in the tariffs * * * and no such carrier shall *refund or remit in any manner or by any device,* directly or in-

directly, or through any agent, or broker, or otherwise, any portion of the rate * * *.' " The court then observed that "The motor carrier received in fact less than the tariff listed because it paid out 4 cents per hundred weight for extra services." (R. 83)

Parenthetically, if the test of a prohibited refund is as the court stated, then payments to local cartage operators for pick-up and delivery service, or even wages to employees, come within the prohibition, since these come out of the carriers' gross revenues.

Petitioner contended that payments by carriers are not rebates unless they reach or benefit the shipper directly or indirectly. As to this, the court conceded that "Probably such rebate is usually in fact made to the shipper." However, the court found authority for holding that the rebate which is prohibited need not be to the shipper, citing the decision of this court in *Union Pacific Railroad Company* v. *United States*, 313 U.S. 450.

In so doing the court misinterpreted the decision of this Court in the *Union Pacific* case. That case is authority for holding that a *direct payment* by the carrier to the shipper is not necessary to the existence of a rebate. It is not authority for holding that a rebate exists in the absence of any concession reaching the shipper, directly or indirectly. In that case, the shippers received large sums of money as an inducement to move their places of business to a new terminal from which they would ship via the Union Pacific. In addition, the shippers received free rent of the leased space. There were clearly substantial concessions and benefits to the shippers in interest of a particular carrier. There are none in this case.

The direct concessions in the *Union Pacific* case were made by the municipal authorities who built the terminal. However, the opinion of this Court shows that the Union

Pacific took over $3,000,000 of municipal bonds on which interest could be paid only out of the income of the terminal. Further, the Union Pacific maintained a dominating position in the entire arrangement and paid out large sums of money on the project.

There is, therefore, an essential difference in principle between that case and this. In the *Union Pacific* case money was paid to shippers and expended for the benefit of shippers. The money paid did not come directly out of carrier funds, although the payments were in the interest of a particular carrier and were promoted by it. In this case the money is not paid to the shipper or for the benefit of any shipper. The money does come directly out of carrier funds just as does the payment of any other legitimate carrier operating expense. The practice in the *Union Pacific* case affected the relation between shipper and carrier and was intended to induce the shipper to use the services of that carrier. In this case the relation between the shipper and carrier is unaffected by the payments. These are not analogous situations either in law or in fact and the lower court erred in treating them as identical.

The decision of the court below is in conflict with the many decisions of this Court in which it is made clear that the primary purpose of prohibiting rebates was to promote equality of treatment among shippers. The purpose was not to restrict or hamper carriers in the employment of facilities or agencies for the performance of their transportation duties. As this Court said in *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U.S. 361, 391:

> The purpose of the Interstate Commerce Act is to secure equality of rates as to all, and to destroy favoritism by any means or device whatsoever, and to place all shippers on equal terms.

In *Merchants Warehouse Co.* v. *U. S.*, 283 U.S. 501, this Court struck down a discriminatory arrangement whereby the railroads employed favorite warehousemen to maintain freight stations for the purpose of attracting their traffic. Even in such a case the Court took occasion to say:

> We may assume that the railroads, in order to carry on their business as interstate carriers, are not bound to maintain their own freight stations, but may contract with others to supply them and to perform there the transportation services which they are under a duty to perform.

In affirming the decision of the District Court despite its own view that the condemned arrangement was desirable and involved no special concession to a shipper, the court below went beyond all previously expressed concepts of the intent of Congress. In the words of the dissenting judge (R. 85):

> I make bold to assert that no court has heretofore gone so far. I suspect that the Commission will be equally surprised with the carriers at the holding.

The statutory requirement of tariff publication.

TARIFF AUTHORITY FOR THE TRANSPORTATION SERVICE RENDERED.

The opinion of the court below contains language which suggests, but does not clearly state, that the practices of the parties were thought to result in special transportation services for which tariff authority was required in addition to the provision for store-door pick-up. The court cited the provisions of Sec. 217(a), which requires the carriers to file tariffs showing all rates for all services. The court said that "Congress intended to compel carriers to exact identical charges for identical service between the same points of service."

From this it may be conceived that the court had in mind

that the receiving of shipments through petitioner's receiving stations involved a different service from that performed when the carrier receives the shipment at the individual shipper's loading platform without the intervention of petitioner as carrier's agent. If so, the court misinterpreted the legal significance of the facts. The service rendered when petitioner receipted for the shipments as carrier's agent and, in conjunction with the carriers, provided the store-door pick-up to which the shipper is entitled under the published rates, is the same service, from the standpoint of the shipper, as that rendered when the store-door pick-up is made at any one of the 90 doors and platforms available on petitioner's premises. Put differently, the facts are clear that without the assailed arrangement each shipper was entitled to tender his freight at any one of the 90 doors or platforms, including those at which the stations are located. The employment of petitioner as carrier's agent did not change that. The shipper still tenders his freight for transportation at any one of the doors or platforms, including the ones at which the stations are located.

The Commission agrees with petitioner that the law requires no tariff authority for maintaining freight stations. (R. 53-4)

TARIFF AUTHORITY FOR THE PAYMENTS TO PETITIONER.

In addition to the question of tariff authority for service rendered, the complaint charged that the statute requires tariff authority for the payments to petitioner for rendering those services. (R. 5) This allegation relates to Sec. 225 of the statute, which requires tariff authority for allowances paid to the owner of the property transported when he renders services in connection with transportation. The District Court concluded that petitioner stands in the

shoes of the shippers and that payments to it are required to be published by that section of the statute. (R. 66-7) Petitioner assigned error to this conclusion. (R. 73) Yet the opinion of the court below contains no mention of that question. In the opinion of the dissenting judge, the failure of the majority to pass upon that vital question was pointed up forcefully. The judge stated (R. 85):

> I agree with the Commission that this order can be sustained only on the theory that the Terminal was acting for and on behalf of the shippers, but I disagree with the Commission that there is any room for such a conclusion on the facts as stipulated. The majority, as I understand the opinion, ignores this vital issue upon which the case was tried below and upon which it is presented here, and holds that the services were illegal, irrespective of whether the services performed by Terminal were on behalf of the carriers or the shippers.

CONCLUSION.

Petitioner and the motor common carriers entered into this arrangement in an attempt to provide economical and efficient means for the handling of interstate freight. Their purpose in so doing was clearly consistent with the purposes of Congress as expressed in the National Transportation Policy, enacted as a preamble to the Interstate Commerce Act and intended to be controlling in the interpretation of all of the provisions of that statute.

If in so doing, the parties have adopted methods or performed acts which contravene the provisions of the statutes, then those methods and actions must be modified or abandoned. However, in order properly to do so, petitioner and the carriers are entitled to a clear and certain interpretation of the law by the courts, from which they can plot their course for the future. That has not been done in this

case and the questions presented deserve the authoritative treatment which only this Court can give.

The importance of the questions presented in this case go far beyond the question whether this petitioner may resume the particular arrangement here involved. This court may judicially notice the countless arrangements of common carriers by railroad, by water and by motor vehicle wherein such carriers employ agents and independent contractors to assist them in the performance of their transportation functions. If the decision of the court below is allowed to stand in this case, it will have a widespread effect to disrupt present arrangements and practices as to which no one in the Commission or in the industry consider any impropriety to be involved.

Petitioner asks the Court to apply in this case the one basic test which all its previous decisions have applied in similar cases. That test is whether the shipper receives either directly or indirectly, any concession or benefit so as to induce him to make shipments via a particular carrier.

Respectfully submitted,

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APPENDIX.

Interstate Commerce Act.

Sec. 217(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

Sec. 217(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or

foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of section 1(7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part.

Sec. 222(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this part, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this part for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

Sec. 225 If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.